UNITED STATES *vs.* JEFFERSON DAVIS

The student will find that American history affords but a few of those engrossing state trials for political offences that stand out so conspicuously in the history of other countries. Indeed the number of such trials that loom large in our annals may easily be limited to three: the trials before the Senate of Samuel Chase and Andrew Johnson,—the only Justice of the Supreme Court and the only President, respectively, ever impeached,—and the trial of Aaron Burr at Richmond for treason. It is a splendid encomium on the integrity of American institutions that each of these trials ended in the acquittal of the accused. The trial, however, which, by all the rules of probabilities, should have been the most important and fascinating state trial in our history and the one which Carl Schurz, echoing the sentiments of the time, expected to be "the greatest trial of the century," proved in the end to be little better than a fiasco.

When, on May 10th, 1865, Jefferson Davis was captured near Irvinsville, Georgia, the problem of what was to be done with the chieftain of the fallen Confederacy assumed concrete form. That its seriousness had not been previously unappreciated is attested by the story that, a short time after Lee's surrender, Lincoln was asked whether it would not be best for everbody if Davis were allowed to get out of the country. To this inquiry Lincoln is supposed to have replied, in characteristic vein, with a story about a preacher—a strict temperance man—who, being offered a glass of water with a dash of spirits in it, remarked he did not object to a drop of something strong in his drink if it were put in "unbeknownst" to himself. But whatever perplexities Lincoln might anticipate from Davis's capture were entirely negligible compared with the enormous difficulties that confronted Johnson — the ink scarcely dry on his proclamation charging Davis with being one of the instigators of Lincoln's assassination—when that event took place.

As illustrative of the pitch to which the feelings, even of men occupying the most responsible positions, had been wrought up by the terrible crime of Booth, it is stated in the life of Senator

Chandler that, in a conference held the day after Lincoln's death between Johnson, Senators Chandler and Wade, John Covode, and Benjamin Butler, it was unaminously agreed that, if Davis was captured, he should be "summarily executed."

Fortunately, however, the cooling influence of the intervening hours witnessed the triumph of more cautious counsel; and Davis, when captured, was merely imprisoned at Fortress Monroe. But the government's determination to press the accusation of complicity in Lincoln's assassination, as well as the charge of treason, was not shaken. Moreover, the plan of a trial before a military commission, whose proceedings would be secret, was broached and even agitated by some of the more extreme Republican leaders. The ear of Carl Schurz, ever sensitive to any threatened violation of the genius of American freedom, caught some hint of this scheme, and, alarmed at the prospect of such an outrage, he immediately dispatched a letter of protest to the President. Johnson, however, never seems to have given the idea the slightest countenance, and his coldness and the open condemnation of the plan by the less radical leaders led to its early abandonment. Also the government speedily realized that it could not prove a shadow of a case should it try to connect Davis with Lincoln's murder. It is true that at one time Judge Advocate Holt, whose credulity Rhodes styles "amazing," thought he could establish the guilty relation. But the evidence on which he relied was quickly demonstrated to be palpably false, and with that discovery the government's last hope of convicting Davis of that heinous crime disappeared forever. The charge, nevertheless, was not withdrawn, and month after month went by and beheld Davis still languishing in prison. Indeed, as the obstacles in the way of meting out any "punishment" to Davis in a constitutional manner became more apparent, the government seemed content to let even the charge of treason lie dormant. The Constitution guaranteed Davis a trial by a jury of the district in which the alleged crime was committed; and it was evidently impossible to procure a jury in Virginia that would pronounce Davis's actions treason unless precautions were taken by the government that would be tantamount to packing the jury box.

No steps, therefore, were taken by the government with a view

to an early disposition of the matter. Davis and his family, however, were anxious for its speedy determination. In May, 1866, Johnson, disquieted by rumors that Davis was being ill-treated in prison, sent McCulloch, Secretary of the Treasury, on an unofficial visit to Davis. McCulloch found the rumors not to be without foundation, as any reader of Mrs. Davis's charming memoir knows so well. In the previous year General Miles had perpetrated, without authorization or the slightest necessity, his unspeakable outrage of putting Davis in irons; and in the matter of food, exercise, clothing, medicine, and above all, privacy, Davis had been inexcusably harassed. McCulloch was very favorably impressed with Davis, reported him eager for trial and "thought the delay unnecessary and unjust." From the time of McCulloch's visit, Davis's treatment was unobjectionable.

In the meatime Davis's tribulations had enlisted the sympathies of Charles O'Conor, the acknowledged leader of the bar of New York, if not of the country, a man whose unbending rectitude and intense devotion to principle gave him a commanding position in the public confidence. Mr. O'Conor volunteered his services to Mr. Davis, and it is needless to add they were gratefully accepted. Mr. O'Conor at once bent his energies to the securing of an early trial by the civil authorities. George Shea, also of counsel, strove in the same direction and enlisted the powerful aid of Horace Greeley, Senator Wilson, and Governor Andrews of Massachusetts, and probably that of Thaddeus Stevens as well. The result of the influences thus set in play was that in May, 1866, the Government finally was forced to make a move and so procured against Davis, in the United States District Court for Virginia, an indictment for treason, under the Treason Act of 1862. The efforts of Davis's friends were now turned towards procuring his release from custody on bond. The friendly offices of Mr. John W. Garrett, President of the Baltimore and Ohio Railroad, were invoked with great effect. Mr. Garrett had considerable influence with Secretary Stanton and through his representations and persuasions Stanton agreed to throw no obstacle in the way. Indeed, early in 1867, General Burton, commander of Fortress Monroe, received the following order: "The President of the United States directs

that you surrender Jefferson Davis, now held and confined under military authority at Fortress Monroe, to the United States Marshal or deputies, upon any process which may issue from a Federal Court in the State of Virginia." On May the first of the same month counsel for Davis had already presented their petition for a writ of habeas corpus to Judge Underwood, then at Alexandria. Judge Underwood issued the writ which was served on General Burton, and on May the 14th, 1867, Davis was delivered to the civil authorities, and, the Government pleading unreadiness for trial, was admitted at once to bail. Horace Greeley and the celebrated philanthropist, Gerrit Smith, signed the $100,000 bond in person and Commodore Vanderbilt signed through Horace Clark and Augustus Schell. Besides these there were fourteen other bondsmen. The scene that was enacted as Davis, the triumph of the civil law complete, emerged from the courthouse, free from custody, is styled indescribable. Mrs. Davis tells of the applause, huzzas, and the waving of handkerchiefs and, above all, the poignant emotions displayed, without effort at concealment, by the spectators.

In December of the same year the cause of United States *vs.* Davis once more came before the court—this time on motion of Davis's council to quash the indictment. Now, however, in addition to Judge Underwood there appeared on the bench Chief Justice Chase, sitting as circuit justice. The motion was accompanied by an affidavit to the effect that before the war Davis had been a member of Congress and had taken oath to uphold the Constitution and, therefore, had been disqualified by the fourteenth amendment from holding office, state or federal, unless such disability was raised by a vote of Congress. On objection by the Government the affidavit was withdrawn, but the facts were admitted for the purpose of the motion. Robert Ould opened the argument for the defendant by contending that the disqualification noted above, inflicted by the fourteenth amendment, was a criminal penalty and recognized as such and was a substitute for all other criminal penalties and impliedly repealed all other former provisions marking out punishments for those who had engaged in the war. He pressed home the argument that no man could be punished twice for the same

offence and, therefore, the punishment contained in the fourteenth amendment was exclusive. The force of Ould's argument is strikingly demonstrated by the fact that at its close the brilliant R. H. Dana, noted for his forensic skill and high talent, could offer no better reply than lamely to declare that Mr. Ould's proposition was entirely new to counsel for the Government and he thought to the Court as well. Chase, however, unsympathetically rejoined that the Court had expected this exact line of argument when it was announced that the motion was based on the fourteenth amendment. Counsel for the prosecution then requested and obtained time to confer. After the court reconvened, the Government contended that the fourteenth amendment merely created a disability and did not inflict a punishment, which could only be the result of judicial sentence. O'Conor closed for Davis in an argument worthy of his great powers. The Court was then discovered to be divided, Chase being in favor of quashing the indictment and Underwood in favor of overruling the motion. The question was therefore, at the request of the defendant, certified to the Supreme Court for its decision.

Before, however, that lofty tribunal had opportunity to hear and determine the matter, the whole affair was disposed of through an entirely different channel. On Christmas, 1868, President Johnson issued his proclamation of general amnesty to all those who had taken part in the war on the side of the Confederacy. Not being specifically excepted, Davis was necessarily included in the proclamation, and, in February, 1869, the Government, harried by O'Conor's persistency, had no other alternative except to enter a *nolle prosequi.* Such was the undramatic, and almost insignificant, final chapter of what Schurz expected to be "the greatest state trial of the century."

Tame, however, as was the ending, it is a chronicle of inestimable value to the lover of American institutions. It shows, more forcibly than any other incident in our history, how potent and salutary are the guarantees thrown by the Constitution around the life and liberty of the individual even when every governmental influence is bent on his destruction; and in so doing it incidentally emphasizes the blessing of a written Constitu-

tion, respected and observed by those who live under it. Also it illustrates, as nothing else that has happened in our national life, what a sobering effect the lapse of a little time has on even the strongest passions, and how loth, upon reflection, are the American people to exact punishment for political offences. In April, 1865, in the excitement of Lincoln's assassination, Johnson was willing to have Davis summarily executed. At the same time the northern section of the country literally thirsted for his blood. A little over three years later Johnson deliberately included Davis in his general pardon and his action met with practically no dissent on the part of the people. No other episode in American history was calculated to put quite so great a strain on the federal Bill of Rights and never was the strain more completely resisted. It is a recital which, on the whole, reflects lasting credit on the genius of American institutions.

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